(3)

No. 02-1129

Supreme Court, U.S.
FILED
MAR 14 2003

In The

Supreme Court of the United States

ROBERT CUNNINGHAM,

Petitioner,

vs.

DARYL GATES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

STEPHEN YAGMAN
Counsel of Record
YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
MARION R. YAGMAN
KATHRYN S. BLOOMFIELD
JOSEPH REICHMANN
723 Ocean Front Walk
Venice Beach, California 90291-3270
(310) 452-3200

Attorneys for Petitioner, Robert Cunningham

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

POINTS IN REPLY 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Heck v. Humphrey, 512 U.S. 477 (1994) 1, 2, 3, 4, 5

Spencer v. Kemma, 523 U.S. 1 (1999) 3, 5

STATUTES

42 U.S.C. § 1983 ..... 1, 3, 4, 5

INTRODUCTION

Respondents seek to cast *Heck v. Humphrey*, 512 U.S. 477 (1994), in a false light, contending it is a judicially-created sort of plea in bar or plea in abatement and that Petitioner sought to get around it by opting not to pursue federal *habeas corpus* relief.

Respondents are wrong. *Heck* either is applicable because its specific rationale supporting its holding warrants its being there, or it is not there. *Heck* in this case presents a matter of legal ontology rather than a game of legal gotchya, as Respondents would want to have it.

If there could be a legal collision between federal *habeas* and section 1983 in this case, then *Heck* would be there. Because there cannot be a collision between federal *habeas* and section 1983, *Heck* is not here. It should matter not the reason there can be no such collision, because *Heck*'s only stated rationale was to avoid the potential legal collision. There is no sound basis to extend *Heck* beyond its own stated premise.

POINTS IN REPLY

1. In the Petition, the question presented is set forth as "[d]oes *Heck v. Humphrey*, 512 U.S. 477 (1994), operate as a bar to the accrual of a claim under 42 U.S.C. § 1983 when *habeas corpus* relief is impossible as a matter of law?" On the first page of the Brief in Opposition, Respondents seek to reframe the question presented, and Petitioner objects to that. The question presented is what is set forth by Petitioner, and Respondents attempt to reframe it as "a question far narrower than the question

Petitioner frames," then setting forth Respondents' question presented is inappropriate.

2. Respondents, through various points, ultimately argue that this Court's decision in *Heck v. Humphrey* should be expanded beyond its stated rationale, to prevent a collision at the intersection of federal *habeas corpus* law and federal civil rights law. They are wrong: *Heck* should not be a bar to the accrual of a civil rights claim when there can be no such collision, no matter the reason the possibility of such a collision does not exist. Otherwise, *Heck* will have become a pernicious bar to the bringing of civil rights actions, but with no logical or legal basis.

In this case, it should matter not what the reason is that there cannot, as a matter of law, be any collision between federal *habeas* law and federal civil rights law. If, as here, a person who has an option to seek *either* federal *habeas* relief *or* federal civil rights relief, opts to waive his right to *habeas* relief in favor of seeking damages relief, that should, logically and legally, be his choice. There is no reason to bar such a person from pursuing the remedy he freely elected.

Construing *Heck* to operate as a bar to a federal civil rights claim when there is no rational basis for that would be wrong.

3. A civil rights plaintiff who opts not to pursue a federal *habeas* remedy in favor of a civil rights action does not, as Respondents contend, "undermine[ ]" the federal *habeas* statute. Br. in Opp. at 6 (quoting Justice Souter's concurring opinion in *Heck*, 512 U.S. at 501). This is so because there is no legal requirement to pursue federal *habeas* relief, and one cannot undermine relief by not availing oneself of it.

4. There is a logical flaw in Respondents' position, and it is this: Petitioner's civil rights claim actually accrued before he suffered his criminal conviction, and therefore, pursuant to the express wording of *Heck*, which does not purport to be a rule of *un*-accrual, *Heck* here should have no application at all.

5. Respondents contend that the language Petitioner relies upon from *Spencer v. Kemma*, 523 U.S. 1 (1999), is "pure dicta." Of course it is. But what Respondents do not address is the legal fact that this "pure dicta" comes from a majority of five Justices of this Court. What Petitioner seeks is for those five Justices to establish their collective *obiter dicta* to law. Fairness requires no less. When five Justices of this Court have spoken as one through *dicta*, it is appropriate for those five Justices to join in making their *dicta* the law.

6. Contrary to Respondents' contention, Br. in Opp. at 7, there is no sound reason to limit the *dicta* of five Justices of this Court in *Spencer* to the facts of that case.

There is no sound reason that the principles set forth by those five Justices in *Spencer* should be limited to *Spencer*'s facts. There is no reason here, just as there was no reason in *Spencer*, to "hold that [anyone would be] out of court of a § 1983 claim[,]" 523 U.S. at 19 (Justice Souter concurring), and "for the [same] reasons explained [by Justice Souter] in [his] *Heck* concurrence, it would be unsound [here] to read either *Heck* of the habeas statute as requiring such a result." *Ibid.* Just as it here now is impossible as a matter of law for Petitioner to seek *habeas* relief, so too is it therefore possible for him to pursue his section 1983 claim. There is no sound reason to bar a

section 1983 plaintiff from opting to pursue damages relief as opposed to *habeas* relief.

7. Respondents contend that "it was not 'impossible as a matter of law' for Cunningham to satisfy *Heck*'s favorable termination requirement[,]" Br. in Opp. at 8, and that therefore, *Heck* bars his claims. Respondents are incorrect because they go from the past tense to the present tense. When it *was* "not impossible" for Petitioner to satisfy *Heck*'s favorable termination requirement, Petitioner was barred by *Heck*'s accrual rule. But now that it *is* impossible for Petitioner to satisfy *Heck*'s accrual rule, there is no sound reason, based on the stated rationale of *Heck*, for its accrual rule to be applied.

8. The Ninth Circuit's ruling is in conflict with the *Jenkins* and *Carr* cases from the Second and Seventh Circuits, respectively, because (A) the rules of law in those cases are the same notwithstanding the underlying facts, whether or not conditions of confinement are at issue (as they were in the two cases), and (B) *Heck* is not stated by this Court to have been intended to be a punishment, but was rationalized as a prophylactic to prevent inconsistency. As a prophylactic against inconsistency it would make no sense at all to use *Heck* when there can't, as a matter of law, be any inconsistency, as here.

Therefore, Petitioner is not attempting to "escape *Heck*'s favorable termination requirement by opting not to pursue his federal habeas remedy[,]" Br. in Opp. at 9, rather Petitioner simply opted not to seek *habeas* relief and the only legal consequence that logically should flow from that opting should be its natural legal consequence, that is, no *habeas* relief. There is no sound reason for there

to be collateral consequences to Petitioner by way of barring his damages claim.

9. Last, Respondents' suggested use of *Heck* perverts and expands *Heck* beyond what this Court said was its purpose. If, as Respondents contend, Br. in Opp. at 10, "[t]he intended result of *Heck* was to prevent a prisoner with two *potential* avenues of relief in the federal court – § 1983 and federal habeas – from bypassing the exhaustion requirements of the federal habeas statute by pursuing his claims via a § 1983 action[,]" (emphasis added), then when there is no longer any *potential* avenue of federal relief except a section 1983 action, there is no sound basis in logic or law for *Heck* to be applied to bar a section 1983 claim, as was recognized by a majority of the Justices of this Court and by the Second and Seventh Circuits, respectively, in *Jenkins* and *Carr*.

CONCLUSION

The Court should grant certiorari in this case in order to limit its ruling in *Heck v. Humphrey* to its stated purpose, to wit, to prevent a collision between federal *habeas* and section 1983, as five Justices agreed, it was limited in concurrence in *Heck* and in *Spencer v. Kemma*, to prevent *Heck*'s accrual rule from being used perniciously to bar legitimate section 1983 claims, and to resolve the conflict between the Ninth Circuit, on the one hand, and the Second and Seventh Circuits, on the other hand.

Heck's sometimes perverted application, as here, is harming thousands of legitimate section 1983 and *Bivens*

plaintiffs, and this Court should grant certiorari to prevent this perversion.

Respectfully submitted,

YAGMAN & YAGMAN & REICHMANN
& BLOOMFIELD
STEPHEN YAGMAN
Counsel of Record

Dated: March 14, 2003.